

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSE GUADALUPE PEREZ-FARIAS,)	NO. CV-05-3061-MWL
et al.,)	
)	ORDER REGARDING PLAINTIFFS'
Plaintiffs,)	MOTION FOR A PROTECTIVE
)	ORDER
vs.)	
)	
GLOBAL HORIZONS, INC.,)	
et al.,)	
)	
Defendants.)	
_____)	

Before the Court is Plaintiffs' April 6, 2007 motion for a protective order to prohibit Defendants from inquiring into the immigration status of all class members. (Ct. Rec. 369).

Background

Plaintiffs request that the Court "order that Defendants are prohibited from inquiring into their immigration status or eligibility for employment to prevent the intimidation of Plaintiff class members and the suppression of the enforcement of class members' rights." (Ct. Rec. 370, p. 11).

Defendants filed no response to Plaintiffs' motion for a protective order. Local Rule 7.1(h)(5) holds that "[a] failure to timely file a memorandum of points and authorities in support of or in opposition to any motion may be considered by the Court as consent on

1 the part of the party failing to file such memorandum to the entry of
2 an Order adverse to the party in default." Accordingly, the Court
3 could have found that Defendants have agreed to the entry of an order
4 granting Plaintiffs' motion for a protective order without hearing.
5 However, the Court held a hearing on this motion to obtain
6 clarification from Plaintiffs on the effect and/or relationship the
7 requested relief would have on the December 18, 2006 order and what
8 effect, if any, the Immigration Reform and Control Act of 1986
9 ("IRCA") and the Supreme Court case of *Hoffman Plastic Compounds, Inc.*
10 *v. NLRB*, 535 U.S. 137 (2002) would have on the requested protective
11 order.

12 Legal Standard

13 For "good cause shown," a court may issue a protective order that
14 "discovery may be had only on specified terms and conditions." Fed.
15 R. Civ. P. 26(c)(2). Fed. R. Civ. P. 26(c) is a safeguard to protect
16 parties and witnesses in view of Fed. R. Civ. P. 26(b)'s broad
17 discovery rights. *United States v. Columbia Broadcasting System,*
18 *Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982). Under Fed. R. Civ. P.
19 26(c), this Court may issue a protective order "to protect a party or
20 person from annoyance, embarrassment, oppression, or undue burden or
21 expense," including:

- 22 1. Prohibiting disclosure or discovery;
- 23 2. Conditioning disclosure or discovery on specified terms;
- 24 3. Preventing inquiring into certain matters; or
- 25 4. Limiting the scope of disclosure or discovery to certain
- 26 matters.

1 To obtain a protective order, the party resisting discovery or
2 seeking limitations must show "good cause" for its issuance by
3 demonstrating harm or prejudice that will result from the discovery.
4 Fed. R. Civ. P. 26(c); *Phillips ex rel. Estates of Byrd v. General*
5 *Motors Corp.*, 307 F.3d 1206, 1210-1211 (9th Cir. 2002). Generally, a
6 party seeking a protective order has a "heavy burden" to show why
7 discovery should be denied and a strong showing is required before a
8 party will be denied the right to take a deposition. *Blankenship v.*
9 *Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). "If the motion for
10 protective order is denied in whole or in part, the court may, on such
11 terms and conditions as are just, order that any party or other person
12 provide or permit discovery." Fed. R. Civ. P. 26(c).

13 Analysis

14 Plaintiffs argue that they are entitled to a protective order to
15 completely prevent Defendants from inquiring into class members'
16 immigration status in this case. (Ct. Rec. 370). Plaintiffs assert
17 that immigration status is not relevant to a determination of damages.
18 (Ct. Rec. 370, p. 11).

19 On November 30, 2005, the Court entered an order regarding the
20 scope of the depositions of the named Plaintiffs. (Ct. Rec. 36). The
21 Court ordered that the scope of the depositions would be limited to
22 liability issues rather than damages or mitigation. (Ct. Rec. 36, p.
23 2). However, the Court held that, after the Court ruled on
24 Plaintiffs' motion for class certification, Defendants would

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1 thereafter be entitled to resume depositions of the named Plaintiffs
2 for the purpose of asking questions related to damages and mitigation.
3 (Ct. Rec. 36, pp. 2-3).

4 On January 4, 2006, the Court granted Plaintiffs' motion for a
5 protective order prohibiting the discovery of Plaintiffs' immigration
6 status, finding that such information was immaterial for purposes of
7 class certification issues. (Ct. Rec. 50). The Court agreed with
8 Plaintiffs' assertion that, at that early stage of the case, where
9 discovery had been limited to issues regarding liability and class
10 certification, a protective order was warranted to prohibit Defendants
11 from inquiring into Plaintiffs' immigration status. (Ct. Rec. 50, p.
12 12).¹ However, the Court further indicated that when the scope of
13 discovery was broadened to include issues as to damages, the
14 immigration status issue could be revisited. (Ct. Rec. 50, p. 12).
15 The Court specifically indicated that "Defendants may seek leave to
16 discover information relating to Plaintiffs' immigration status" at a
17 later juncture. (Ct. Rec. 50, p. 12).

18 Plaintiffs' motion for class certification was granted by the
19 Court on July 28, 2006. (Ct. Rec. 136). Pursuant to the Court's
20 earlier order (Ct. Rec. 36, pp. 2-3), Defendants were thereafter
21 entitled to resume depositions of the named Plaintiffs for the purpose
22 of asking questions related to damages and mitigation. On November
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24
25 ¹Plaintiffs argued that, similar to the case *Rivera v. NIBCO, Inc.*, 364 F.3d
26 1057 (9th Cir. 2004), the discovery sought by Defendants was at the beginning of the
27 litigation process, and, at that stage of the litigation, was not relevant. (Ct.
28 Rec. 37). Specifically, Plaintiffs asserted that "[i]nquiry into plaintiffs'
immigration status in this matter is not relevant to a determination for class
certification matters." (Ct. Rec. 37, p. 6). The Court agreed. (Ct. Rec. 50).

21, 2006, Defendants moved the Court for a modification of the January 4, 2006 protective order. (Ct. Rec. 178).

On December 18, 2006, the Court granted Defendants' motion for a modification of the protective order. (Ct. Rec. 200). The Court indicated that the immigration status of class members is relevant to a defense even though immigration status is not an element of Plaintiffs' employment discrimination cause of action. (Ct. Rec. 200, p. 6). The Court granted Defendants the relief they requested; namely, a modification of the January 4, 2006 protective order to permit Defendants to introduce evidence "already in their possession" related to the immigration status of certain class members but not to allow further inquiry into the immigration status of Plaintiffs. (Ct. Rec. 198, p. 2; Ct. Rec. 200, p. 5).

While the Court had previously found that immigration status was not relevant to the previously limited scope of discovery (Ct. Rec. 50), now that the class has been certified and discovery has been broadened to include damages (Ct. Rec. 36; Ct. Rec. 136), the immigration status of Plaintiffs is, again, ripe for discussion (Ct. Rec. 200).

In the hearing on the instant motion, the effect of the provisions of IRCA and the *Hoffman* case were discussed. The Ninth Circuit in *Rivera* specifically addressed and distinguished both IRCA and the Supreme Court's ruling in *Hoffman* in affirming a protective order prohibiting inquiry into the immigration status of plaintiffs during the discovery process. The *Rivera* Court found that the chilling effect such discovery could have on the bringing of civil

1 rights actions unacceptably burdens the public interest. *Rivera*, 364
2 F.3d at 1065. The *Rivera* Court balanced the interest of the defendant
3 in discovering immigration status information during the discovery
4 process against the chilling effect on the plaintiffs and found that
5 such discovery, though relevant, would be an undue burden justifying
6 the protective order. *Rivera*, 364 F.3d at 1066-1075.

7 The *Rivera* case dealt with the issue now before this Court except
8 in a Title VII action. As noted in *Rivera*, contrary to Plaintiffs'
9 argument (Ct. Rec. 370, p. 11), the immigration status of the class
10 members is relevant to a determination of damages. The fact that a
11 defendant's violation might be "inconsequential" because a plaintiff
12 may not be eligible for certain forms of relief "goes to the issue of
13 damages, not liability." *Rivera*, 364 F.3d at 1070 (citations
14 omitted). Nevertheless, the *Rivera* Court held that the need for
15 discovery of various plaintiffs' eligibility for particular remedies
16 is outweighed by the harm the discovery could cause the plaintiffs.
17 *Rivera*, 364 F.3d at 1070. The *Rivera* Court took notice of a proposed
18 method to handle the immigration status issue during a damages phase
19 of trial should plaintiffs prevail during a liability phase of trial.²
20 *Rivera*, 364 F.3d at 1062, 1073. The holding and analysis of *Rivera* is
21 controlling on the issue now before the Court.

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23 ²As proposed by Plaintiffs in *Rivera*, if plaintiffs were able to prove
24 liability, the Court could then hold an *in camera* hearing designed to preserve the
25 plaintiffs' anonymity, protect plaintiffs' statutory rights, and avoid prejudicing
26 the defense. The proceeding would allow each plaintiff to testify regarding her
27 immigration status, provide documents supporting her entitlement to backpay, and
provide a formal certification from the Social Security Administration attesting
that she was authorized to work throughout the backpay period. The judge would make
deductions from the aggregate award backpay for any plaintiff who failed to prove
eligibility. *Rivera*, 364 F.3d at 1062.

1 Consistent with *Rivera*, Defendants are prohibited from
2 questioning Plaintiffs regarding their immigration status.³ *Rivera*,
3 364 F.3d at 1070. However, as in *Rivera*, Defendants are not precluded
4 from conducting their own independent investigation. *Rivera*, 364 F.3d
5 at 1062. Consistent with this Court's December 18, 2006 order,
6 Defendants are permitted to utilize evidence in their possession
7 regarding the immigration status of class member Plaintiffs. (Ct.
8 Rec. 200). Defendants may not, however, conduct inquiry during the
9 discovery process into the immigration status of Plaintiffs.

10 **CONCLUSION**

11 Based on the foregoing, Plaintiffs' motion for a protective order
12 prohibiting Defendants from inquiring into their immigration status
13 (Ct. Rec. 369) is **GRANTED**. Defendants are prohibited from questioning
14 Plaintiff class members regarding their immigration status.

15 **IT IS SO ORDERED.** The District Court Executive is directed to
16 enter this Order and forward copies to counsel.

17 **DATED** this 10th day of May, 2007.

18
19 s/Michael W. Leavitt
MICHAEL W. LEAVITT
20 UNITED STATES MAGISTRATE JUDGE
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25 ³If not already accomplished in the liability phase of depositions, Defendants
26 may, however, conduct discovery concerning "the plaintiffs' places of marriage,
27 educational background, current and past employment, damages, date of birth, and
28 criminal convictions. . . ." *Rivera*, 364 F.3d at 1062.